DEPARTMENT OF SAFETY AND PERMITS
CITY OF NEW ORLEANS

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MAYOR

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DIRECTOR

MEMORANDUM

TO: **THE NEW ORLEANS CITY COUNCIL**

FROM: **ZACHARY SMITH, DIRECTOR**

BY: **ASHLEY BECNEL, CHIEF ZONING OFFICIAL**

JENNIFER CECIL, DIRECTOR, ONE STOP

RE: **RESOLUTION NO. R-19-7**

DATE: **FEBRUARY 15, 2019**

The Department of Safety and Permits (the "Department") is in receipt of Resolution No. R-19-7, which directs the Department to provide recommendations to the New Orleans City Council on improved platform accountability, including but not limited to: mechanisms for improved data sharing, existing gaps in data provided by home-sharing platforms that would be beneficial to enforcement and facilitate oversight of the short term rental program, platform registration, and tax/fee remission. These recommendations are contained in this memorandum. Should the Council have any additional questions or desire any additional information, the Department would be happy to provide further assistance.

EXECUTIVE SUMMARY

Given that the City's relationships with the platforms to date have not produced useful enforcement data, changes to the structure of those relationships are necessary in any update of the City's short term rental laws. Other cities have wrestled with this same question, and valuable lessons can be taken from their experiences. Many face extensive litigation from the platforms, and some have had their laws enjoined from taking effect. In other cases, platforms have been willing to cooperate with cities, either as a formal settlement agreement to end ongoing litigation or in return for being a partner in crafting the laws at issue. The law in this area is unsettled and unpredictable, and the next few years of judicial review should bring additional clarity as to the rights of cities and platforms in regulation of this growing industry.

Review of other cities' regulations has shown that a platform licensing scheme which imposes penalties and liability on platforms who collect a fee for facilitating the illegal short term rental of unlicensed properties can be very effective. Providing a "safe harbor" provision whereby platforms that meet certain data sharing measures—generally, requiring license data from hosts, passing this license data on to the city, and removing listings the city identifies as unlicensed—are presumed to be in compliance with their platform permit regulations can facilitate compliance and streamline enforcement. It is important for cities to avoid the legal issues that may be posed by

the First Amendment and the Communications Decency Act, which the platforms argue prevent cities from requiring them to post certain information, and from the Fourth Amendment, which platforms allege prevents cities from requiring far-reaching data about each hosted listing. The carrot-and-stick liability and safe-harbor methodology presented above appears to successfully navigate these hazards while allowing the city to effectively enforce its licensure requirements.

MEMORANDUM

A. A History of Platform Relations to Date

The Department believes that a complete answer to this question requires a detailed history of the City's relationships with the platforms and efforts to compel data sharing to date. As such, we hope that this background information is helpful to the Council in understanding the challenges faced, as well as the position from which the Department provides its regulatory recommendations for future legislation.

1. The development of the voluntary collection agreement

The City and Airbnb entered into a voluntary collection agreement (the "VCA") on December 7, 2016 for the collection of New Orleans hotel sales and use and hotel occupancy privilege taxes by Airbnb on behalf of the City for short term rentals ("STR") conducted through that platform. Under the VCA, Airbnb agreed to collect and remit hotel tax on taxable booking transactions completed on its platform, and to report information regarding such collections to the City in an aggregate form. The City agreed that such reporting could be conducted on an anonymous basis, and that any audits by the City would focus on Airbnb, itself, rather than individual taxpaying hosts. The VCA had a one year term, and while it could be renewed for up to four additional one-year terms, such renewal never occurred and the VCA expired on December 6, 2017.

The City's rationale for entering into the VCA was not expressly set out in the Agreement; however, the City believed that facilitating the collection of such taxes by allowing Airbnb to serve as the collection agency would streamline the process and serve the public purpose of increasing tax revenues stemming from Airbnb STR transactions as well as making it easier for citizens serving as hosts on the Airbnb platform to remit such taxes.

The VCA was also addressed by the previous administration during the Council hearing regarding Cal. No. 31,621, under which the Council heard a variety of ordinances implementing short term rental laws and approved the Mayor's signature of the VCA.

2. The development of pass-through registration and data sharing

Throughout policy negotiations in 2015 and 2016, Airbnb actively engaged with both the legislative and executive branches. Although not addressed in the VCA, as a courtesy to its hosts, the City and Airbnb worked together to provide "pass-through registration." This practice allowed Airbnb hosts to apply for their City STR license through the Airbnb site at the same time they created a listing for their property on the Airbnb site. The intention of engaging in this form of registration was to maximize the ease of compliance and eliminate the barriers encountered by

other cities which resulted in low registration rates, including but not limited to a requirement to apply in person. The majority of hosts listing on other sites also list on Airbnb, and the single license issued via pass-through registration with Airbnb is applicable to other listings of the same unit. Nonetheless, the Department's technical team was working actively on setting up a similar system with HomeAway, whose business model had evolved to incorporate active facilitation of booking transactions, prior to their withdrawal of cooperation with City-issued subpoenas in August 2017.

Section 26-620 of the City Code requires platform data sharing. Section (a) requires any short term rental hosting platform listing STRs in the City to provide certain information on a monthly basis, including:

- Total STRs listed on the platform;
- Total nights rented per listing;
- Nights booked per listing for the rest of the calendar year;
- Permit type for each listing; and
- Total tax collected and remitted to the City.

The Code specifies that STR platforms are not required to provide personally identifiable information in fulfilling this requirement. Section (b) provides the City with the power to administratively subpoena information. The section does not specify what information is subject to such subpoena, but it does not exclude personally-identifiable information. Rather, (b) requires that the subpoena pertain to "a specific investigation by the city related to a single short term rental that is specifically identified in the subpoena, and alleges the specific violations of this article and of the applicable provisions of the Comprehensive Zoning Ordinance." The platforms have ten days to notify users of the subpoena and twenty-one days from this notice to provide the responsive records.

In practice, these legislative measures were also part and parcel of the larger negotiations between the City and Airbnb. When these ordinances were presented to the Council by the prior administration, it was clear that everyone understood them to be part of the deal as negotiated and amendments to the ordinances as proposed were rejected because they would potentially upset the agreement between the City and the platforms. At the time, it was understood that Airbnb was the only platform that could practically comply with the data sharing provisions because the business models of other platforms, including HomeAway, were geared toward advertisement of rentals rather than facilitating rental transactions. However, since this time, HomeAway's business model has shifted to a transactional model and therefore should be required to comply with these laws.

3. The voluntary collection agreement in practice

While the VCA expired in 2017, Airbnb continues to remit hotel taxes to the City on an anonymous basis even though Airbnb no longer provides pass-through registration for hosts. Tax collection on behalf of Airbnb hosts has, from the information available to this Department, gone relatively smoothly. The data is aggregated, so its reliability is unclear, but further questions on this topic would best be directed to the Department of Finance, Division of Revenue.

4. Pass-through registration and data reporting in practice

a. Pass-through registration

An unfortunate byproduct of the informal agreement to develop pass-through registration with Airbnb was that no penalties existed for failure to provide particular information, nor did they exist for the failure of the platforms to do so in any required timeframe. While the effort to lower barriers to registration were successful, leading to more than 60% of short term rentals in New Orleans having valid licenses (most cities had less than 25%), the technical shortcomings of the arrangement required extensive Department of Safety and Permits ("Department") resources for repetitive reviews. While Airbnb could communicate license application data to the City, the City had no mechanism of revising or overwriting data to return to Airbnb. Therefore, if data was inaccurately entered into Airbnb and corrected on the City side, or if a different type of license was issued to a host than that for which the host applied, Airbnb continued to operate solely on the information provided at initial sign-up by the host. This lead to properties with valid licenses appearing to have no license to users browsing the platform, and properties that were ineligible for licenses to be able to reapply and reactivate their listing to get bookings.

Pass-through registration was problematic even before Airbnb refused to continue allowing it. Airbnb had no expiration date for applications, meaning that any host who began an application, regardless of whether it was ultimately completed, submitted, or approved, was shown as having "City registration pending." The Department communicated to Airbnb about applications that had not been approved, and Airbnb claimed to be purging these listings periodically. Despite this, the Department routinely discovered listings for applications that had been denied or abandoned months earlier.

b. Monthly Data

The City faced a myriad of issues with monthly data submission from both Airbnb and HomeAway. The data shared by both platforms had significant quality issues. Airbnb provided some reports in which the reported nights rented per year did not match the monthly totals for listings. (For example, a report would state a total number of nights that did not match the actual sum of the fields that it purported to sum.) HomeAway sent the same month's information regarding nights rented to the City repetitively before finally examining the spreadsheet to reveal that the report parameters had been permanently set on a particular prior month without being changed. Furthermore, Airbnb initially refused to provide any monthly data for any host who had not taken advantage of their pass-through registration.

The data actually received has proven to be of limited utility for enforcement. Airbnb responses contained the requested information, but did not link it to the specific listing for which it was requested, thus preventing it from being used in enforcement proceedings. The Department's data team was, at times, able to overcome this hurdle by matching email addresses to specific users, and then checking the City's pass-through database for the email addresses, but this was burdensome and inefficient. HomeAway subpoena responses identified the data by list**ing**

number, but monthly reports were identified by lister number, making them impossible to reconcile.

c. Administrative Subpoenas

The most difficult provision to enforce of any license type was the ninety-night limitation on temporary licenses. The monthly data was used to identify any listing that had rented ninety or more nights. However, because the data was anonymized, and the Department had not been able to overwrite a license type initially entered for the pass through, the Department had to subpoena all listings with greater than ninety nights rented, not just temporary licenses.

The administrative subpoena provisions of Chapter 26 were negotiated prior to the final adoption of license types. As practical application of the subpoena process became necessary for effective enforcement, the platforms raised previously unarticulated concerns about the legality of responding to subpoenas with the information that the Department needed. Their chief inhibition was their understanding of the application of the Stored Communications Act (SCA).

While the SCA requires platforms to provide data subpoenaed by a court or administrative body enabled by federal or state statute, the platforms challenged the Department's authority even though this authority derives from the City's home rule charter, which is enabled by the Louisiana Constitution. Instead of providing the data requested, which generally included details such as listing address, they only responded with "basic subscriber information." This was justified by the platforms on the basis that the subpoenas issued only met the standard of a lesser provision of the SCA. This basic subscriber information was not helpful in the Department's enforcement efforts as it did not contain an adequate level of detail for the Department to find it usable without significant data analysis.

Both platforms claim that they cannot release address or license number information because it would prove personally-identifiable. However, both produced data which inhibited definitive identification of properties. Subpoena response data contained contact information (not owner information), contact email addresses, telephone numbers, and IP addresses. No address data or license number data was provided. Because a contact can be associated with several properties, but not be the owner of any of them, the Department found the information to be of limited value in most instances. As the Department could not confirm whether the property was licensed because it could not identify the property, the Department was not able to pursue violators or exclude prosecution of license holders whose license type allowed them to rent for greater than ninety days.

The Department has found the administrative subpoena process to be cumbersome at best given the limited level of compliance from the platforms. Airbnb initially refused to respond to subpoenas for information on hosts who did not participate in pass-through registration. Furthermore, Airbnb construed the subpoenas only to apply to those applications which were designated at the point of pass-through initiation as "temporary" or "unknown." As a result, Airbnb produced no data regarding commercial or accessory listings, or listings which were miscategorized at the time of application as either of these license types.

5. Attempts to improve the voluntary collection agreement

It is the Department's understanding that there is no longer a VCA in place with Airbnb, and that none has yet been entered with HomeAway. However, this Department would not necessarily be aware of such a contract and encourages the Council to verify the existence of same with the Department of Finance and Law Department.

6. Attempts to improve pass-through information and data sharing

From the negotiated inception of pass-through registration with Airbnb, the City has consistently and repetitively requested the data elements included below as part of the information collected from Airbnb, as well as part of the information sent back to Airbnb. Yet, since the agreement for data sharing was an informal one, when Airbnb stood their ground on only being willing to accept back a yes/no/pending response on the application, the Department had two choices: (1) try to build the largest and most accurate inventory of short term rentals possible despite wading through a miasma of information; or (2) cease development of an interface and encounter the same low compliance experienced in other locations.

Data Elements Requested by City	Provided via Airbnb pass-through	Provided in Airbnb Subpoena Resp.	Provided in HomeAway Subpoena Resp.
Address - House Num, Street Name, Apt/Ste/Unit (MCS 27204, Line 81, 144)	Yes	No	No
Type of Rental being applied (Accessory, Temporary, Commercial) (MCS 27204, Lines 12-14, 83, & 146)	Yes	Yes	No
Number of bedrooms total (MCS 27204, Lines 83-84)	No	No	No
Number of bedrooms being rented (MCS 27204, Lines 83-84)	No	No	No
Applicant Information (MCS 27204, Line 82, 142-143) • Address • Phone • Email	Yes	Yes	Yes
Applicant Identity (Owner OR Tenant) (MCS 27209 Line 337-338)	No	No	No
24/7 Operator/Property Manager (MCS 27204, Lines 61-63 & 85-87) • Address • Phone • Email	No	No	No
Agent for Service(MCS 27204, Lines 20-29 & 71-72) • Address • Phone • Email	No	No	No

As a result of Airbnb's refusal to collect or supply this additional information for pass-through applications, Department staff had to contact 4,786 separate applicants individually by email and phone during the first three months that licensing was in in effect in order to obtain the information that Airbnb was unwilling to collect and share.

While revisiting this topic during 2018 renewals, the Department hoped Airbnb would better understand the City's uses of this data and recognize their legal requirements to comply with City regulations. Unfortunately, the only concession agreed to by Airbnb was that they would not further anonymize pass-through data.

From the fall of 2017 through spring of 2018, the City also collaborated with HomeAway in an effort to develop a license validation or pass-through system. However, HomeAway's technical resources were pulled out to execute terms agreed to by the company in another lawsuit, and before formal testing could begin, cooperation with platforms broke down following the introduction of the STR Interim Zoning District (IZD). The IZD is a prohibition on the issuance of temporary short term rental permits in certain zoning districts.

On June 6, 2018, following the May 25, 2018 passage of the IZD, communications between the City and both platforms eroded. Airbnb, who had previously required a license number field upon listing unless they were pending the Department's evaluation via pass-through registration, removed the license field from all New Orleans listings and disabled pass-through registration. HomeAway had never required such a field and since pass-through had not completed testing, the erosion of communication was the major impact.

Airbnb's decision to remove the license field from New Orleans listings may have had serious negative ramifications for licenseholders whom Airbnb did not inform. Essentially, removal of the license field made all listings non-compliant with the Sec. 26-618 requirement that all listings include a valid license number. As a result, the Department engaged in a three-month communication campaign with hosts using the contact information collected to re-contact over 4,000 licenseholders individually and instruct them on how to bring their listings back into compliance. Although staff persevered to create an integrated registration system, and steadfastly responded to applications within two weeks, regardless of the volume, the informal nature of the City's relationship to the platforms from the outset of the regulations gave the City less meaningful leverage. Because of this breakdown in cooperation, the Department saw a year's worth of work to build the highest compliance rate in the country disappear overnight. Going forward, the Department strongly recommends that any data exchange agreements should be formalized and specified clearly, and legally enforced from their inception rather than the ad hoc methodology of the pass-through registration experience.

7. Successes and challenges to date regarding data sharing with platforms

Without being able to speak directly to the success of tax collection, this Department's experience with data, licensing, and enforcement has been challenging. We have at all times attempted to cooperate and overcome any hurdle presented by the regulations and any agreements surrounding it through unrelenting persistence. We believe that the initial partial cooperation of Airbnb was critical to the Department being able to accurately identify listings registered via pass-through registration and make sure those listings were compliant. Because we knew the locations of most units, we believe our enforcement was a fairly successful deterrent to disruptive activity, seeing as approximately 8% of the nearly 7,000 violations involved any sort of nuisance, according CPC

Short Term Rental Study—2018 Ed.[1] Additionally, the experiment of attempting to facilitate registration via platform was a useful learning experience and a valuable case study for policy interventions in the sharing economy. However, the City has also found that the platforms raised objections to the laws as agreed after the rules had been adopted, and have responded to changes in rules by refusing to cooperate with City regulatory requirements.

Overall, the Department has found that working with the platforms is challenging at best. With the exception of tax remittance on behalf of its hosts, which is likely a necessary business courtesy for their customers, the platforms have failed to operate in good faith, especially following the introduction of the May 25, 2018 IZD. While the regulations originally passed were the result of negotiations between the City and the platforms, the platforms have gone to great lengths to avoid meeting their end of the bargain. Their actions may be legitimately characterized as deliberate data obfuscation, refusal to provide required data, and a total failure of cooperation with any enforcement mechanisms pursued by the City against platform users who violate the law.

B. Mechanisms for Improved Data Sharing

Under the current regulatory landscape, the Department sees few opportunities for improved data sharing. While the City could attempt to rigorously enforce its data sharing provisions contained in Section 26-620, it is unclear what the penalty for non-compliance by platforms would be. State law caps fines at $500 per day under La. R.S. 13:2500. Courts have interpreted this provision to require that each daily violation must be separately pled and proved in order for the fine to attach on a daily, rather than one-time, basis. The City could also more zealously prosecute the platforms' failure to adequately respond to administrative subpoenas by platforms; however, the same issues regarding penalties apply to this tactic. Enforcement resources to date have been focused on individual properties being rented, rather than on enforcement of the existing platform requirements, and it is likely that additional resources will be needed to legally confront these sophisticated corporate entities. Any revisions to the law, however, could address these shortcomings, as further explored herein.

One clear lesson learned by the City moving forward is that any agreement with the platforms cannot solely be captured in its ordinances, given the platforms' shifting levels of willingness to comply therewith, and that if this is the case, the City makes adequate plans for the enforcement of same.

C. Existing Gaps in Provided Data

The most crucial gap in the provided data is that of the address being rented. Platforms have proven willing to provide other personally-identifiable information related to its users through the administrative subpoena process, including their names and email addresses, but have consistently refused to provide the address listed on the site for STR. For some hosts, the listing address will be the same as the host's address, as in for the current accessory license type which requires a

[1] CPC Short Term Rental Study – 2018 Ed. at Table 3, p. 47.

homestead exemption. However, for temporary and commercial listings, which operate on a whole-home basis, the address to be rented is frequently different from the permanent address of the host. Without reliable information regarding which listing is at issue, it makes enforcement for such provisions as illegal listing of unclisensed properties or listing in excess of licensed days extremely difficult to enforce. The lack of access to this data also makes enforcement of areas where STRs are prohibited problematic. The City has encountered hosts who advertise and rent properties in the French Quarter, but without being able to obtain the exact address being rented through the platform, has found enforcement of this requirement difficult. This is also a problem faced by the City in the case of condominium buildings, where even if the City is able to ascertain the building's physical address, it frequently cannot connect a listing with a specific unit number or owner/licenseholder.

San Francisco and Seattle appear to have found a solution to this conundrum. They require that platforms collect license numbers from anyone completing a transaction from their platform. The license number data can then be compared against the city's licenseholder database to verify proper licensure and to locate the property at issue based on the city's records. A crucial component of the success of these systems is that the platforms regularly remove unlisted or otherwise illegal listings from their platforms. Seattle receives aggregate rental data, but neither city receives data regarding the number of nights each specific listing is rented from the platforms directly. San Francisco requires hosts to submit such data to the city directly as a requirement of their individual license, and uses data scraping techniques to verify its accuracy as best as is practicable.

D. Platform Registration

Platform regulation is a complex issue, and many cities and courts nationwide are wrestling with how to best address the role played by the platforms in the short term rental transaction. While some platforms previously operated principally as advertising outlets, most have now transitioned into actively facilitating the transaction between short term renters and hosts. As facilitators, these platforms have a financial interest in the actual rental, which can subject them to regulation.

Generally, successful regulation of platforms could greatly improve the City's ability to enforce its laws. By requiring platforms to collect and remit taxes to the City (as the City has previously done by cooperative endeavor agreement with Airbnb), hosts and the City alike find that the tax remittance process is streamlined and facilitated. Platform regulation could also help the City with enforcement of its regulatory laws, principally through a combination of regulating the data the platforms are required to provide to the City and through regulation of the platforms' ability to facilitate illegal transactions. Other cities are experimenting with both such types of regulations, and their experiences are instructive.

1. Chicago

Chicago enacted its Shared Housing Ordinance (SHO) in June 2016. The SHO separates platforms into two main types: "short term residential rental intermediaries" and "short term residential rental

advertising platforms." Platforms falling into the intermediary type are required to bulk register all shared housing units and to remove listings without valid registration numbers. The ordinance required platforms to register with the city and to provide certain information regarding properties listed on their platforms on a bimonthly basis, including but not limited to the number of residences listed on the platform, total nights rented per listing, rent paid by guests, and taxes paid by the platform. The information had to be submitted in the aggregate, but also by ward. The ordinance also provided an administrative subpoena process for non-anonymized information pertaining to specific properties the city believed to be in violation of the law.

A coalition of short term rental hosts sued the city alleging that the SHO violated federal law. The Court found in favor of the city in that suit, holding that the SHO did not violate the First Amendment's right to free speech since it regulated the business activity of the short term rental industry, which it characterized as an economic transaction with incidental effects on speech. While the plaintiffs appealed this verdict, the Seventh Circuit Court of Appeals found that no plaintiff had standing to press the suit and remanded it back to the district court for further proceedings related to standing.

2. *Santa Monica*

Santa Monica prohibited vacation rentals, as defined as rentals of residential property for thirty consecutive days or less, where residents do not remain within their units to host guests, in May 2015. In January 2017, the city enacted further legislation which prohibited platforms from advertising or facilitating rentals that violated the city's short term rental law, and which required platforms to collect and remit taxes to the city and to disclose certain information about listings to the city, including, upon request, addresses of each residential unit offered on the platform for rental and actually rented in a specified month. The ordinance further provided that "platforms shall not complete any booking transaction for any residential property unless it is listed on the city's registry at the time the hosting platform receives a fee for the booking transaction." It also includes a "safe harbor" provision that presumes that any platform which is complying with the tax and data sharing requirements set out in the law are in compliance with the law.

HomeAway and Airbnb jointly challenged these laws. They alleged that the laws violated the federal Communications Decency Act (CDA), which prevents providers of interactive computer services from being treated as speakers or publishers of any information provided by another content provider, even if the information is provided through the original provider's site. Citing the precedent set by litigation in San Francisco over a similar law, the court held that the law did not violate the CDA. The Santa Monica court quoted the Northern District of California's opinion in the San Francisco challenge, concluding that the ordinance "held plaintiffs liable for their own conduct, namely for providing, and collecting a fee for, [b]ooking [s]ervices in connection with an

unregistered unit."[2] The same court later dismissed the platforms' First Amendment claims, believing that the speech at issue was commercial speech and therefore subject to regulation under the First Amendment. The court also noted that "[i]t is well-settled that the First Amendment does not protect commercial speech 'related to illegal activity' and, thus, there is no constitutional interest in publishing . . . ads that solicit criminal activity."[3] These rulings are currently being appealed to the U.S Ninth Circuit Court of Appeals.

3. San Francisco

San Francisco's laws mirrored those of Santa Monica, and the legal challenges faced by that city also mirrored the above. The district court upheld the laws; however, the city and the platforms subsequently reached a settlement agreement regarding the litigation. Under this settlement agreement, Airbnb and HomeAway agreed to require hosts to provide a license number, to provide a listing to the city that ties the provided license numbers to listing URLs, and to actively remove illegal listings and cancel reservations attached to those listings if the city notifies them that the listing is not properly registered. The settlement further allows the city to fine Airbnb and HomeAway $1,000 per listing that is not properly removed after notice.

4. Boston

Boston's short term rental ordinance, which took effect January 1, 2019, requires the platforms to enter into an agreement with the city to assist in the enforcement of their regulations. Under these agreements, the platforms would be required to remove non-compliant listings from their sites. Airbnb has filed suit in order to enjoin the enforcement of these ordinances. Airbnb complained that the law includes excessive fines which essentially preclude them from doing business within Boston, that the law violates the First Amendment by requiring platforms to remove illegal listings from their platforms, and that it violates the CDA by holding the platforms responsible for monitoring user-generated content. The plaintiffs also argue that the ordinance violates the Stored Communications Act (SCA) by requiring platforms to disclose confidential customer information to the city without any legal process. The SCA prevents electronic communications providers from releasing confidential user data without specific government processes and without notifying users of the disclosure. This matter has not yet been decided by courts.

5. New York

New York adopted an ordinance in August 2018, scheduled to go into effect on February 2, 2019, which required platforms to submit a monthly report of transactions for which they receive fees. These reports had to include: (1) the physical address of the property being rented; (2) the full

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[2] *Homeaway.com, Inc. v. City of Santa Monica*, 2018 WL 1281772 at *5 (quoting *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066, 1073 (2016)).

[3] *Homeaway.com, Inc. v. City of Santa Monica*, 2018 WL 3013245 at *6 (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980)).

name, address, phone number and email address of the host; (3) the name, number, and URL of the advertisement; (4) whether the rental was of an entire dwelling unit or a portion of a dwelling unit; (5) total number of days rented through the platform per listing; (6) total fees received by the platform for each listing; and (7) the amount of rent received by the host and account name and consistently anonymized identifier for the host's account.

Airbnb and HomeAway successfully sued the city, seeking an injunction to prevent the ordinance from going into effect as scheduled. The Southern District of New York held that the monthly reporting requirement violated the search and seizure requirements of the Fourth Amendment. The Court held that the platforms had a protected privacy interest in the data sought as a business record. In order for the city to obtain this data, it needed to provide an opportunity for the platforms to obtain precompliance review of the reasonableness of the request before an independent body. The court also noted that the data request was not tailored to only listings which the city had a reasonable basis to suspect were unlicensed or otherwise illegal, but rather affected all listings, whether licensed or not.

6. Miami

Immediately after its victory in the Southern District of New York, Airbnb filed suit against the City of Miami Beach. Miami Beach's ordinance, which became effective on December 21, 2018, provided that rental platforms could not post listings which did not include business license and resort tax registration numbers. The ordinance exempted platforms which agreed to "geo-fence" properties located in certain areas where short term rentals were prohibited. Airbnb's suit raises claims under the CDA, arguing that the requirement to block listings which did not include license information forced platforms to monitor third-party content on its website. The suit has not yet been heard by courts. A similar ordinance in Palm Beach County has been legally challenged by both Airbnb and HomeAway.

7. Seattle

Seattle enacted an ordinance requiring platform registration which goes into effect on May 1, 2019. This ordinance is not involved in litigation currently, and was cited to the Department by HomeAway representatives as an example of regulation that the platforms can support and with which they can comply. Seattle requires each platform to register with the city, and, like San Francisco, to require hosts to provide a license number for each listing. The platforms are required by rule to provide monthly data to the city that shows all licensed operators listing units on the platform, as well as the units listed by those operators, which will be identified by their city-issued license number as well as their listing URL. The platforms are also required to provide, on a quarterly basis, an aggregate total of all listings and all nights booked through the platform. Platforms are required to remove any listings that the city indicates are illegal or unlicensed.

Crucially, this ordinance has not yet gone into effect, and therefore it is difficult to evaluate how it has operated in practice. Further review will be necessary to demonstrate whether and how

platform compliance will work. It is worth noting that many of the provisions in the Seattle ordinance are similar to laws that the platforms have objected to elsewhere, and it remains unclear how willing the platforms will be to cooperate with the laws as enacted. The City has a somewhat rocky history regarding platform cooperation, and the Department will be monitoring the Seattle rollout closely in order to learn how it plays out and what lessons New Orleans can take from their experience. It is also worth noting that Seattle is in the Ninth Circuit Court of Appeals, which is the same venue as San Francisco and Santa Monica, and where the judges have, to date, upheld the cities' data sharing requirements. It is unclear whether the platforms would be as willing to cooperate in a different jurisdiction.

E. Tax/fee Remission

The Department of Safety and Permits does not handle taxes pertaining to short term rentals, nor does it collect Neighborhood Housing Improvement Fund (NHIF) fees assessed therewith. Safety and Permits does collect permitting fees as well as enforcement fines related to short term rentals. These fines and fees have always been remitted directly to Safety and Permits by hosts to ensure proper accounting for each license and/or lien within the LAMA system. Even when Airbnb provided the courtesy of pass-through registration, registrants were directed to the One Stop website to pay for their licenses.

Any in-depth discussion of the City's relationship to the platforms regarding taxes and NHIF fees would require the involvement of the Department of Finance, since they are the agency who is responsible for such collections. Still, the Department of Safety and Permits, after consultation with Romy Samuel, the City Collector of Revenue, is glad to provide the following high-level summary.

The only platform that has ever provided tax remittance services on behalf of its hosts is Airbnb, which it did pursuant to the VCA described above. In that VCA, Airbnb expressly agreed "contractually to assume the duties and rights of a Hotel Tax 'dealer' or 'operator,' as described in the applicable Code." Pursuant to this VCA, Airbnb collected taxes on transactions it facilitated through its platform, and remitted them to the City. Airbnb was required "reasonably to report aggregate information on the tax return form prescribed by the Taxing Jurisdiction." The City retained the right to audit Airbnb on the basis of the tax returns and supporting documentation provided by Airbnb, and not to directly or indirectly audit any individual host "unless and until an audit of Airbnb by the Taxing Jurisdiction has been exhausted with the matter unresolved." The information provided in these audits was on "an anonymous numbered account basis." The authority to audit any individual host for activity that the City learned of independent of the VCA (for example, through citizen complaints) was retained by the City.

City attempts to audit Airbnb have proven difficult in practice because Airbnb's anonymous account numbers cannot be tied to individual addresses or individual taxpayers. Essentially, there is no verifiable way for the City to validate the rental numbers provided by Airbnb to ensure that all taxes are being remitted properly. The same concerns exist for NHIF collections.

Despite the expiration of the VCA, Airbnb continues to remit taxes on this anonymized basis. No other platform remits taxes to the City on behalf of its user-hosts, including HomeAway. Some hosts do directly report and pay taxes related to their short term rental revenues to the City; however, they represent a small fraction of the total short term rental transactions citywide. It is clear that tax revenue owed to the City is not being paid; however, it is unclear what the scope of these unremitted taxes and fees may be given the lack of information to which the City has access.

F. Lessons Learned

Based on the above, the Department provides the following regulatory recommendations which are mindful of the current climate and calibrated to take into account concerns posed by litigation in other cities as well as the practical necessities of effective enforcement. The Department has made structural recommendations to the Chief Administrative Officer for future enforcement practices, as additional capacity will likely be required.

Given the extensive litigation described in this memorandum, it is clear that regulation of platforms is potentially legally fraught. One possible method of addressing this is to simply not regulate the platforms. Platforms have fought nearly every attempt to require them to share data with cities in order to aid those cities with the enforcement of their regulatory laws, with the notable exception of the settlement agreement reached with their home city, San Francisco, and the Seattle's regulatory scheme, which was produced and negotiated with platform cooperation. Platform litigation may not only be time-consuming and costly; rather, it may also result in a court enjoining the City from enforcing its short term rental laws during the pendency of the suit, as is the case in New York City. Without platform regulation, platforms themselves would not have standing to legally challenge the City's short term rental laws, because they would not be subject to those laws—only their customers would. This does, however, require that the City forfeit even the chance at obtaining platform data, and does not fully immunize the City from suit over the laws, as the Chicago litigation demonstrated.

To the extent that the City does wish to move forward with platform regulation in order to assist with enforcement of its short term rental laws, the experiences of other cities have allowed us to distill a workable path forward. First, the City should only regulate the transaction of renting a property primarily used as a residential property, and not the advertising of such a rental or other aspects of the platforms' relationships with hosts and/or potential renters. Second, the City should consider a safe harbor provision similar to Santa Monica's, whereby platforms are presumed to be good actors and can demonstrate compliance through cooperation with data sharing rather than active investigation of platform conduct. The reasoning for this is twofold—first, it achieves the City's aims in a way that is presumably less burdensome to platforms, and second, it conserves the City's resources to address the actual properties causing violations, rather than the platforms, which participate in millions of transactions a year on an international basis. Third, the City should consider limiting the data it requires to be shared to reasonable parameters in order to avoid the Fourth Amendment problems encountered by New York City. While the address of the property

being rented is a crucial piece of information for the City that must be part and parcel of any effective platform regulation, there may be ways to limit the information required. The model set forth by San Francisco and Seattle is instructive. There, platforms require hosts to provide a license number in order to list a property for rental. The platforms provide that number along with the listing identification to the cities, and the cities can verify it against their own licensing databases, which do contain property addresses. This allows the cities to connect their database with that of the platform and obtain essentially full transparency over rental data. Crucially, the platforms in both cities remove unlicensed listings upon notice from the city. If the platforms fail to comply, liability attaches to their facilitation of an illegal transaction. Any workable platform registration plan should feature both the carrot—presumed compliance in exchange for cooperation—and the stick—liability and penalties for non-compliance—in order to assure full enforcement of laws.